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No. 97-1535

In the Supreme Court of the United States

OCTOBER TERM, 1997

GENERAL MEDIA COMMUNICATIONS, INC., ET AL.,
PETITIONERS

v.

WILLIAM S. COHEN, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether 10 U.S.C. 2489a (Supp. II 1996), which restricts "the sale or rental of sexually explicit material on property under the jurisdiction of the Department of Defense," violates the First and Fifth Amendments.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-44a) is reported at 131 F.3d 273. The opinion of the district court (Pet. App. 45a-67a) is reported at 952 F. Supp. 1072.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1997. A petition for rehearing was denied on February 3, 1998. Pet. App. 68a-69a. The petition for a writ of certiorari was filed on March 16, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case presents a facial constitutional challenge to 10 U.S.C. 2489a (Supp. II 1996), originally introduced as the Military Honor and Decency Act of 1996 (the Act), which prohibits the government from selling or renting "sexually explicit material" on military property. See National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 343, 110 Stat. 2489.[1] The Act defines "sexually explicit material" as "an audio recording, a film or video recording, or a periodical with visual depictions, produced in any medium, the dominant theme of which depicts or describes nudity, including sexual or excretory activities or organs, in a lascivious way." 10 U.S.C. 2489a(d)(1) (Supp. II 1996).[2]

The Act does not prohibit members of the armed forces from possessing sexually explicit material on military property. Nor does it prohibit members of the armed forces from buying sexually explicit material off military property or from ordering such

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[1] The Act provides that "[t]he Secretary of Defense may not permit the sale or rental of sexually explicit material on property under the jurisdiction of the Department of Defense," 10 U.S.C. 2489a(a) (Supp. II 1996), and that "[a] member of the armed forces or a civilian officer or employee of the Department of Defense acting in an official capacity may not provide for sale, remuneration, or rental sexually explicit material to another person," 10 U.S.C. 2489a(b) (Supp. II 1996).

[2] The Department of Defense has elaborated on that definition in a Directive-Type Memorandum implementing the Act. Pet. App. 74a-78a. The memorandum defines "lascivious" to mean "[l]ewd and intended or designed to elicit a sexual response." *Id.* at 76a. The memorandum also provides that "[m]aterial shall not be deemed sexually explicit because of any message or point of view expressed therein." *Ibid.*

material for delivery by mail on military property. Pet. App. 6a.

The Act primarily operates to prevent the sale of sexually explicit material at military exchanges and other stores located on military property. 10 U.S.C. 2489a(d)(2) (Supp. II 1996). Those federal "nonappropriated fund instrumentalities," or NAFIs, exist "for the comfort, pleasure, contentment, and mental and physical improvement of the armed forces." 5 U.S.C. 2105(c).[3] Military exchanges and commissaries are not open to the general public. They are open only to military personnel, their dependents, and other affiliated persons upon the display of appropriate military identification. Pet. App. 12a; DOD Dir. 1330.9, §§ 2-101, 2-201, 2-301.

2. Petitioners are General Media Communications, Inc., which publishes *Penthouse* and other magazines, and various trade associations whose members produce, distribute, and sell magazines, books, sound recordings, and videos. Pet. App. 48a-49a. Before the Act became effective, petitioners brought this action against respondents, the Secretary of Defense and the Department of Defense, seeking a declaratory judgment that the Act violates the First and Fifth Amendments. They also sought an injunction against enforcement of the Act. Pet. 8-9.

The district court, observing that this case is "about pornography, and whether the Constitution protects plaintiffs' right to distribute it in military

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[3] NAFI employees are civilian federal employees who are outside the civil service. 5 U.S.C. 2105(c); 10 U.S.C. 1587(a)(1). Commissaries may be operated by private persons, but procurement functions must be carried out by Department of Defense personnel. 10 U.S.C. 2482 (Supp. II 1996).

exchanges," held the Act to be unconstitutional on three grounds. Pet. App. 45a-46a.

First, the district court held that the Act violates the Free Speech Clause of the First Amendment. The court noted that the Act does not reach all sexually explicit material, but only that which is "lascivious"—a term that the government equated with the "patent[] offensive[ness]" prong of this Court's three-pronged obscenity definition. See Pet. App. 54a-55a (citing *Miller* v. *California*, 413 U.S. 15, 24 (1973)). But the court viewed the "patent offensiveness" limitation as rendering the Act more, not less, constitutionally problematic, relying on this Court's statements, in other contexts, that Congress cannot prohibit non-obscene speech merely because society may find it offensive. *Id.* at 52a-61a. The court concluded that, "[b]ecause the purpose of the Act is to ban expression that is * * * 'patently offensive' * * * and because the First Amendment prevents the government from banning material solely because it is offensive, the Act is unconstitutional." *Id.* at 59a. The court rejected the government's contention that the Act is justified as a means of enabling the military to promote such "core values" as honor, decorum, and professionalism, and of avoiding the appearance of official endorsement of sexually explicit vulgarity. *Id.* at 58a-59a.

Second, the district court held that the Act violates the equal protection component of the Fifth Amendment. The court, applying strict scrutiny, concluded that the government had not demonstrated a compelling justification for singling out the material reached by the Act from other sexually explicit material. Pet. App. 62a-64a.

Third, the district court held that the Act's definition of sexually explicit material was impermissibly vague in violation of the Due Process Clause of the Fifth Amendment. The court concluded that "the term 'lascivious' as it is used by the Act contains a subjective element," and thus could be applied by government officials in an arbitrary or discriminatory manner. Pet. App. 65a-66a. The court conceded that petitioners "cannot be directly penalized under the Act because its effect is only to prevent military personnel from stocking their products." *Id.* at 66a. But the court reasoned that the Act could indirectly influence petitioners' behavior, such as by causing them to "scale back their expressive conduct" so that their products could continue to be sold at military exchanges. *Ibid.*

After holding the Act unconstitutional under the First and Fifth Amendments, the district court permanently enjoined respondents "from changing, as a result of the Act, their existing stock, display and selling policies or practices with respect to materials that may be deemed subject to the Act." Pet. App. 67a. The court did not enjoin respondents from ceasing to stock, display, and sell sexually explicit materials for other reasons.

3. The court of appeals reversed. Pet. App. 1a-44a. The court acknowledged at the outset that "[t]he Constitution does not, of course, stop at the gates of a military base." *Id.* at 3a. But the court also recognized, as has this Court, that "the rights of [persons] in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty." *Ibid.* (quoting *Parker* v. *Levy*, 417 U.S. 733, 744 (1974)).

a. The court of appeals concluded that the Act satisfies the appropriate First Amendment standard by "reasonably further[ing] legitimate governmental interests" without discriminating against particular viewpoints. Pet. App. 27a-28a.

The court rejected petitioners' assertion that newsstands at military exchanges are "public forums"—*i.e.*, areas reserved for expressive activity, whether by tradition or by governmental designation — where any content-based regulation of speech is subject to "the highest scrutiny." Pet. App. 8a-9a, 11a. The court instead concluded that such newsstands are "nonpublic forums," where even content-based regulations of speech "need only be reasonable," so long as they are not based on "disagreement with the speaker's view." *Id.* at 9a (quoting *International Soc'y for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 679 (1992)). The court noted that military exchanges, and consequently their newsstands, are not open to the general public. *Id.* at 12a. Nor has the government "offer[ed] to resell the merchandise of every producer, or every 'speaker,' who seeks access to th[e] shelves" of military exchange newsstands. *Id.* at 12a-13a.

The court next concluded that, while "[t]he Act assuredly distinguishes between permissible and impermissible speech on the basis of content, * * * it does not rise to the level of viewpoint discrimination." Pet. App. 14a. The court rejected, as "linguistic overreaching," petitioners' argument that the Act targets speech expressing "a *viewpoint* of 'lasciviousness,'" explaining that the Act's reference to "lasciviousness" was more sensibly viewed as identifying the content, not the viewpoint, of the material covered by the Act. *Id.* at 15a-16a; see *id.* at 16a (questioning

"how, for example, would one go about discussing and considering the political issues of the day from a lascivious viewpoint?"). The court found support for its position in this Court's observation in *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 388 (1992), that distinctions among obscene materials based on "prurience" or "lascivious[ness]" would not constitute impermissible viewpoint discrimination. Pet. App. 16a.

The court further concluded that the Act was a "reasonable" restriction on speech in the military context—a context in which particular deference is due the judgments of the political branches. Pet. App. 17a-18a (citing *Rostker* v. *Goldberg*, 453 U.S. 57, 70 (1981)). The court reasoned that the government has a legitimate interest in "ending the military's involvement in the sale of sexually explicit materials," in order to avoid "sending a message that the military approves of or endorses these materials," and thereby to "promote[] military honor, professionalism, proper decorum, and military 'core values.'" *Id.* at 19a-21a.

b. The court of appeals also rejected petitioners' argument that the Act violates the equal protection component of the Fifth Amendment by restricting the sale and rental of only certain categories of sexually explicit material (*e.g.*, magazines but not books, visual forms of lascivious expression but not verbal ones). Pet. App. 22a-24a. The court explained that the Act's distinctions among types of sexually explicit material "need only survive rational-basis analysis," because the Act does not restrict speech in a public forum, as did the regulations in *Carey* v. *Brown*, 447 U.S. 455 (1980), and *Police Department of Chicago* v. *Mosley*, 408 U.S. 92 (1972), or otherwise violate the First Amendment. Pet. App. 23a. The court determined that "Congress could rationally have concluded that

[military] exchanges do not trade extensively in books containing sexually explicit material and that, consequently, it was unnecessary to include books under the Act's prohibition," and that "visual forms of lascivious expression are more prevalent, more likely to be noticed, or more provocative than written materials, and that accordingly there was a greater need to regulate such materials." *Ibid.*

c. The court of appeals finally held that the Act was not impermissibly vague under the Due Process Clause of the Fifth Amendment. Pet. App. 24a-27a. The court recognized that a statute that imposes only civil penalties—or, as here, "no penalties at all"—need not be drafted with the same precision as a criminal statute. *Id.* at 25a (citing *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-499 (1982); *Winters* v. *New York*, 333 U.S. 507, 515 (1948)). The court also recognized that Congress is allowed "greater flexibility" in drafting statutes governing the military. *Id.* at 25a (quoting *Parker*, 417 U.S. at 756). The court concluded that, "[m]easured by these guideposts," any arguable vagueness or ambiguity in the Act was "constitutionally tolerable." *Id.* at 26a. It further noted that this Court had rejected as "insubstantial" a claim that the term "lascivious" was unconstitutionally vague even in a criminal statute. *Ibid.* (citing *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 78-79 (1994)).

d. Judge Parker dissented on the First Amendment issue. Pet. App. 29a-44a. He did not address the question whether a military exchange is a public forum (*id.* at 33a n.3), because he concluded that the Act's restrictions on lascivious expression constitute viewpoint discrimination (*id.* at 33a), and thus are subject to the same heightened scrutiny even in a

nonpublic forum (*id.* at 36a). He asserted that "[p]ortrayals of nude men and women designed to elicit a sexual response illustrate an idea: that lust or sexual desire is good, that men and women are sexual beings, or, if depicted in a submissive way, that women or men are submissive objects for humiliation or domination." *Id.* at 33a.

Applying an intermediate scrutiny standard, Judge Parker concluded that the Act is not "reasonably necessary to protect [a] substantial government interest," and thus violates the First Amendment. Pet. App. 38a-39a (quoting *Brown* v. *Glines*, 444 U.S. 348, 358 (1980)). He based that conclusion primarily on the absence of affirmative "evidence" in the Act's text or legislative history that Congress did, in fact, determine that the sale or rental of sexually explicit material undermines military values by implying an official endorsement of such material. *Id.* at 40a-44a.

e. On February 6, 1998, the court of appeals granted petitioners' motion to stay the issuance of the mandate pending the disposition of any petition for certiorari. Pet. App. 70a-71a. The Act has consequently never been enforced.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. This Court's review is therefore not warranted.

1. The court of appeals properly reviewed 10 U.S.C. 2489a (Supp. II 1996), the Military Honor and Decency Act of 1996 (the Act), with deference to Congress's preeminent authority over the military. See Pet. App. 17a-18a. Congress is empowered by the Constitution "[t]o raise and support Armies," U.S.

Const. Art. I, § 8, Cl. 12, "[t]o provide and maintain a Navy," *id.*, Cl. 13, and "[t]o make Rules for the Government and Regulation of the land and naval Forces," *id.*, Cl. 14. "It is clear that the Constitution contemplated that the Legislative Branch have plenary control over rights, duties, and responsibilities in the framework of the Military Establishment." *Chappell* v. *Wallace*, 462 U.S. 296, 301 (1983). The courts consequently "give Congress the highest deference in ordering military affairs" pursuant to those constitutional powers. *Loving* v. *United States*, 116 S. Ct. 1737, 1748 (1996); accord *Rostker* v. *Goldberg*, 453 U.S. 57, 70 (1981) ("judicial deference * * * is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged").

This Court has taken a deferential approach to constitutional challenges arising in the military context. See, *e.g.*, *Loving*, 116 S. Ct. at 1748 (separation of powers); *Weiss* v. *United States*, 510 U.S. 163, 177 (1994) (due process); *Solorio* v. *United States*, 483 U.S. 435, 447-448 (1987) (court-martial jurisdiction, Fifth Amendment); *Goldman* v. *Weinberger*, 475 U.S. 503, 509-510 (1986) (free exercise); *Chappell*, 462 U.S. at 301 (equal protection); *Rostker*, 453 U.S. at 70 (equal protection); *Parker* v. *Levy*, 417 U.S. 733, 758 (1974) (free speech); see also *Greer* v. *Spock*, 424 U.S. 828, 837-838 (1976) (concluding that military base was not First Amendment public forum for expressive activity); *id.* at 843-844 (Powell, J., concurring) ("civilian expression in the domain of the military" must be addressed in context of its "functional and symbolic incompatibility with the 'specialized society separate

from civilian society,' that has its home on the base") (quoting *Parker*, 417 U.S. at 743).

2. Petitioners principally contend (Pet. 12-19) that the court of appeals erred in holding that the Act does not involve the regulation of speech in a public forum. They argue (Pet. 14) that newsstands and bookstores in military exchanges are designated public fora, in which the government may regulate the content of speech only with a compelling justification and by the least intrusive means. Petitioners' position is flawed for two reasons: It is doubtful that "forum" analysis applies at all in this context. And, in any event, the newsstands and bookstores of military exchanges are, at most, nonpublic fora, as the court of appeals held. Pet. App. 8a-13a.

a. This Court has recognized that "the public forum doctrine should not be extended in a mechanical way" to "very different context[s]." *Arkansas Educ. Television Comm'n* v. *Forbes*, No. 96-779 (May 18, 1998), slip op. 5. The Court has applied "forum" analysis only in the context of "restrictions that the government seeks to place on the use of its property," *International Soc'y for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 678 (1992), where such restrictions would prevent private individuals from using that property to engage in expressive activity. See, *e.g.*, *Rosenberger* v. *Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 830 (1995) (student religious group seeking access to public university's student activities fund); *International Soc'y for Krishna Consciousness*, 505 U.S. at 679-683 (religious solicitors seeking access to public areas of airline terminal); *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 45-47 (1983) (rival teachers union seeking access to school mail system).

The Act, by contrast, does not restrict any private individual from using government property to engage in expressive activity. Nothing in the Act prohibits individual service members from possessing, circulating, displaying, or discussing "sexually explicit material" anywhere on a military base. Nor does the Act prohibit petitioners (or their members) from selling such material by mail, telephone, or the internet to individual service members who reside on a military base. The Act simply regulates the government's *own* activity as the proprietor of military exchanges—specifically, its decisions about which magazines, films, and audio and visual recordings to purchase for resale to service members. It is thus wholly unlike those government restrictions on private expressive activity that this Court has subjected to "forum" analysis. Cf. *Lehman* v. *City of Shaker Heights*, 418 U.S. 298, 304 (1974) (plurality opinion) (city council's action, "in a proprietary capacity," permitting only commercial advertising, and not political advertising, on its transit cars need only be "reasonable" to satisfy First Amendment); *United States* v. *Kokinda*, 497 U.S. 720, 725 (1990) (plurality opinion) (recognizing that "a lower level of First Amendment scrutiny" applies when the government is acting "as proprietor, to manage [its] internal operation[s]") (internal quotation marks omitted).[4]

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[4] Contrary to petitioners' suggestion (Pet. 18 n.13), whether the decision not to sell "sexually explicit material" at military exchanges was made by Congress, as opposed to the business managers of the military exchanges, is of no legal consequence. Congress can establish federal procurement policy by statute under its constitutional authority to "make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. Art. I, § 8, Cl. 14; see *Lehman*, 418 U.S. at 300-301, 304

It is inherent in the operation of any retail establishment that the proprietor continually makes choices as to which products are to fill its limited shelf space, whether those products are magazines, sneakers, or toothpaste. Those choices often involve the sorts of considerations that have no place in "forum" analysis. For example, while the government, in its administrative capacity, may not decide which groups receive permits to parade on a public street based on the popularity of their message, petitioners concede (Pet. 17) that the government, in its proprietary capacity, may decide which products to stock at its stores based on their popularity among consumers. Moreover, when the products available at a retail establishment include books, magazines, or other expressive materials, the proprietor often takes their content, and even their viewpoint, into account in deciding which ones to stock. We do not perceive petitioners to dispute that the government, as proprietor, could choose to sell *Ms.* magazine at a military exchange, in place of one of several more traditional women's magazines with higher circulations, in order to provide a diversity of viewpoints to its customers. But considerations of content and viewpoint are generally inappropriate in determining access to a public forum.[5]

(characterizing "city council action" to restrict topics of transit advertising as action "by the city in a proprietary capacity").

[5] Cf. *Arkansas Educ. Television Comm'n*, No. 96-779, slip op. 6 (recognizing that certain government actions, "by [their] nature," may "facilitate the expression of some viewpoints instead of others," such as "a university selecting a commencement speaker, a public institution selecting speakers for a lecture series, * * * a public school prescribing its curriculum," or a public broadcaster making programming decisions).

Any decision that the government's actions as the proprietor of a retail establishment are subject to "forum" analysis would have significant implications, not only for military exchanges but also for public universities, libraries, museums, and other entities that purchase expressive material to be resold, loaned, or exhibited to the public. At a minimum, therefore, the Court should not consider any extension of "forum" analysis into this area until the issue has been more fully considered by the lower federal courts.

b. Even if "forum" analysis were applicable here, military exchanges—or, as petitioners prefer (Pet. 13), their newsstands and bookstores—would be, at most, nonpublic fora where reasonable restrictions on speech are permissible. Petitioners concede (*ibid.*), as they must, that military exchanges, or certain sections of them, are not traditional public fora, as are public parks and streets. They contend (Pet. 13-14) only that the newsstands and bookstores are "designated" public fora, *i.e.*, that the government has deliberately set aside those areas for expressive activity. The court of appeals correctly concluded that petitioners failed to satisfy this Court's standard for demonstrating the existence of a designated public forum. Pet. App. 8a-13a. Such an application of settled legal principles to the particular facts of this case does not warrant further review.

This Court has repeatedly recognized that "[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985); accord *Arkansas Educ. Television Comm'n*, No. 96-779, slip

op. 9-10 ("Designated public fora * * * are created by purposeful government action."); *International Soc'y for Krishna Consciousness*, 505 U.S. at 679-680; *Hazelwood Sch. Dist.* v. *Kuhlmeier*, 484 U.S. 260, 267 (1988). The Court has thus required affirmative evidence of the government's "clear intent to create a public forum," *Cornelius*, 473 U.S. at 802, such as a policy or practice of opening the property at issue "for indiscriminate use by the general public," *Perry Educ. Ass'n*, 460 U.S. at 47, or by some portion of the public. Accord *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392 (1993). It is often relevant to that analysis whether the property at issue is "separat[ed] from acknowledged public areas," which may "indicate that the separated property is a special enclave, subject to greater restriction." *International Soc'y for Krishna Consciousness*, 505 U.S. at 680.

This Court, applying the foregoing analysis, has concluded that "[m]ilitary bases generally are not public fora." *United States* v. *Albertini*, 472 U.S. 675, 686 (1985); accord *Greer*, 424 U.S. at 838 ("the business of a military installation like Fort Dix [is] to train soldiers, not to provide a public forum"); *Shopco Distrib. Co.* v. *Commanding General*, 885 F.2d 167, 172 (4th Cir. 1989) (recognizing that "[a]lmost without exception, courts have concluded that military bases fall into the non-public forum category") (citing cases from other circuits). Nor are particular portions of military bases to be classified as public fora merely because they are "specifically used for the communication of information and ideas." *United States Postal Serv.* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 130 n.6 (1981) ("a bulletin board in a cafeteria at Fort Dix is * * * no more a

'public forum' than are the street corners and parking lots found not to be so at the same military base").

The same conclusion should apply to the newsstands and bookstores within military exchanges. Petitioners do not even attempt to demonstrate that Congress, or the Executive, has "intentionally open[ed]" those areas "for indiscriminate use by the general public," or by some portion of the general public that includes petitioners and their members. *Cornelius*, 473 U.S. at 802; *Perry Educ. Ass'n*, 460 U.S. at 47. Nor could they successfully do so. It cannot readily be supposed that the government would have deliberately chosen to open the shelves of military exchanges to all publishers without regard to content—including publishers whose works, for example, are demeaning to racial, ethnic, or religious minorities, or are the propaganda of unfriendly foreign governments, or are simply of no interest to the vast majority of service members. But the necessary consequence of creating a public forum is to provide access to all speakers without regard to the content of their speech. Cf. *Capital Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753 (1995) (recognizing that public fora are open to expressive activity by Ku Klux Klan).

It is also relevant that military exchanges are not generally accessible—either to the public or to vendors—which confirms that they are not public fora, but "a special enclave, subject to greater restriction." *International Soc'y for Krishna Consciousness*, 505 U.S. at 680. The general public is not permitted to enter military exchanges. Pet. App. 12a.[6] Nor do

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[6] Petitioners argue (Pet. 16-17) that the court of appeals' reliance on the fact that the public cannot gain access to

vendors enjoy any indiscriminate right of access to the shelves of military exchanges. Government purchasing officials have traditionally exercised discretion over what products are sold at military exchanges based on, *inter alia*, whether they have determined those products to be "'necessary' to the health, comfort and convenience of members of the armed forces." *Id.* at 21a.[7] Petitioners concede as much. Pet. 17 (noting that government purchasing officials have traditionally considered factors such as "consumer demand" in deciding which products are to be sold at military exchanges). "A designated public forum is not created when the government allows selective access for individual speakers rather than general access for a class of speakers." *Arkansas Educ. Television Comm'n*, No. 96-779, slip op. 11.

Petitioner's argument, at bottom, is that the government created a public forum by inaction—*i.e.*, by initially allowing individual purchasing officials to decide, without guidance from Congress, which magazines, films, and audio and video recordings to stock at military exchanges. See Pet. 17. But this Court has

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military exchanges conflicts with this Court's statements that a designated public forum may be created for use by a particular group or for a particular purpose. However, although a public forum may be designated for a limited audience, the ultimate question remains whether the government intended to create such a public forum. No such intent has been demonstrated here. To the contrary, when the government has both limited the audience of the "forum," and selected the speakers (*e.g.*, publishers) to be admitted to the "forum," a strong inference should arise that the government did not intend to create a public forum.

[7] For example, military exchanges already neither sell nor rent video recordings of films rated X or NC-17 by the motion picture industry. See C.A. J.A. 165, 177, 205.

made clear that "[t]he government does not create a public forum by inaction or by permitting limited discourse." *Cornelius*, 473 U.S. at 802.

c. Petitioners, in straining to present an issue that could attract this Court's attention, mischaracterize the decision below on the public forum issue. For example, petitioners fault the court of appeals for "focus[ing] * * * on the military's practices with regard to entire *bases*," rather than on "exchanges alone—those portions of military property that offer access to magazines, newspapers, and books." Pet. 15. But that is not what the court of appeals did. The court, after gaining perspective on the issue from the decisions of this Court and other courts rejecting public forum claims with respect to military bases (Pet. App. 10a), specifically considered, and declined, petitioners' invitation "to adopt the view that the[] 'newsstands' [in military exchanges] are public forums" (*id.* at 11a). The court based that conclusion on the history and purpose of military exchanges (*id.* at 11a-12a), on the restrictions imposed by the government on public access to military exchanges (*id.* at 12a), and on the government's policy and practice, as proprietor of military exchanges, not to "grant[] unlimited access to military exchanges" for "the merchandise of every producer, or every 'speaker' who seeks access to [their] shelves" (*id.* at 12a-13a). It is thus evident that, contrary to petitioners' assertions, the court's "forum" analysis focused on the military exchanges, and specifically their newsstands, and not on "entire bases."

Petitioners again distort the court of appeals' opinion by claiming (Pet. 15) that the opinion rested "on the misapprehension that military bases * * * cannot be designated public fora unless they have

been 'abandoned.'" The court neither articulated nor applied what petitioners characterize (Pet. 16) as an "'abandonment' test."[8] To the contrary, the court applied what this Court, and petitioners themselves (*ibid.*), recognize to be the proper analysis: whether the government "intent[ionally]," as opposed to "by inaction or by permitting limited discourse," designated an area "for use by the public as a place for expressive activity." Pet. App. 9a-10a (quoting *Cornelius*, 473 U.S. at 802; *Perry Educ. Ass'n*, 460 U.S. at 45); see also *id.* at 11a ("governmental intent is the touchstone for determining whether a public forum has been created").

Finally, while petitioners assert that the court of appeals' decision "conflicts with this Court's precedents" (Pet. 12), they do not, and cannot, cite any case in which this Court has held that the government created a designated public forum in analogous circumstances, *i.e.*, merely by operating a commercial establishment at which merchandise, including expressive material, selected by the government is resold to customers. The court of appeals' decision, in concluding that such an establishment is not a public

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[8] Indeed, the court used the term "abandoned" only twice during its discussion of the public forum issue (Pet. App. 10a, 13a)—both times in quoting this Court's statement in *Albertini*, 472 U.S. at 685-686, that military property would generally be deemed a public forum only where the government had "abandoned any right to exclude civilian traffic and any claim of special interest in regulating expression." In any event, the statement in *Albertini*, with its focus on the government's intent, is consistent with what petitioners agree to be the proper standard for determining the existence of a designated public forum.

forum, is fully consistent with the decisions of this Court.

3. The court of appeals also correctly held (Pet. App. 13a-17a) that the Act's prohibition on the government's sale or rental of "lascivious" materials does not constitute viewpoint discrimination, *i.e.*, an "effort to suppress the speaker's activity due to disagreement with the speaker's view." *Rosenberger*, 515 U.S. at 800. In order to amount to a "viewpoint" under this Court's decisions, lasciviousness would have to be "a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." *Id.* at 831. It is not.[9]

This Court has recognized that restrictions on "lascivious," "lewd," or "indecent" speech are not based on viewpoint. For example, in *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 388 (1992), the Court explained that, even though obscenity is unprotected speech, a State could not prohibit "only that obscenity which includes offensive *political* messages," because such a prohibition would constitute "idea or viewpoint discrimination" in violation of the First Amendment.

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[9] Petitioners contend (Pet. 25) that they "express a particular viewpoint"—*i.e.*, that "sexuality [is] healthy and enjoyable" —that the Act "singles out * * * for suppression while permitting contrary viewpoints." But the Act, by its terms, reaches *all* lascivious magazines, films, and video and audio recordings, whatever viewpoint, if any, they may express about sexuality. And the Department of Defense has confirmed that material should not be deemed "sexually explicit," and thus prohibited under the Act, "because of any message or point of view expressed therein." Pet. App. 76a. The Act cannot be deemed viewpoint discriminatory merely because it may (assuming *arguendo* the correctness of petitioners' unproven assertions) incidentally affect more speech on one viewpoint than on another.

But the State could, consistent with the First Amendment, "choose to prohibit only that obscenity which is the most patently offensive *in its prurience* —*i.e.*, that which involves the most lascivious displays of sexual activity." *Ibid.* It was an essential premise of the Court's discussion that distinctions based on "prurience" or "lascivious[ness]" are not "idea or viewpoint discrimination." See also *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675, 685 (1986) (punishment of public high school student for use of "offensively lewd and indecent" language in speech to students was "unrelated to any political viewpoint"); *Board of Educ.* v. *Pico*, 457 U.S. 853, 871 (1982) (plurality opinion) (removal of books from public school library because of their "pervasive vulgarity" would be permissible whereas removal of books because of their "ideas" would not); *id.* at 877-880 (removal of books could not be based on a desire to restrict access to "political ideas or social perspectives," but could be based on, *inter alia*, offensive language) (Blackmun, J., concurring); *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 743 n.18 (1978) (opinion of Stevens, J.) ("A requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication.").[10]

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[10] Petitioners assert (Pet. 22 n.15) that the Court's discussion of "prurient" or "lascivious" speech in *R.A.V.* is inapposite because the Court was discussing restrictions on obscenity. But the Court's underlying premise in *R.A.V.*—that a regulation of speech based on its prurience or lasciviousness is not viewpoint based—has nothing to do with whether the speech is, or is not, obscene. Petitioners also assert (Pet. 21 n.14) that the portions of *Fraser* and *Pico* cited in the text should be disregarded because those cases "involved primary public schoolchildren"—

Petitioners contend (Pet. 20) that the Act is "necessarily viewpoint-based," *not* because of its text, but because of its underlying purpose, *i.e.*, to display the military's "core values" to members of the armed services. But petitioners have pointed to no authority suggesting that the government engages in unconstitutional viewpoint discrimination where, as here, the government seeks to demonstrate its own values by declining to sell materials at its own stores that it perceives to be inconsistent with those values. Cf. *Rust* v. *Sullivan*, 500 U.S. 173, 194 (1991) ("When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism.").

Petitioners further contend (Pet. 22) that the Act should be deemed to be viewpoint discriminatory because it "targets a specific segment of the print medium." No such contention was addressed by either the majority or the dissent in the court of appeals. And the cases relied on by petitioners (Pet. 23) are not analogous to this case. Each of those cases involved a state tax that "targeted a small group of newspapers," *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221, 228 (1987), or magazines, *id.* at 229 & n.4.[11] The Court declined to extend the holdings

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a point that not only is factually inaccurate, see *Fraser*, 478 U.S. at 677 (case involved high school students), *Pico*, 457 U.S. at 856 (case involved high school and junior high school students), but that has no bearing on the Court's distinction between viewpoint-based and vulgarity-based distinctions.

[11] See *Arkansas Writers' Project, Inc.*, 481 U.S. at 229 & n.4 (invalidating state tax that affected possibly only one, and at most three, publishers); *Minneapolis Star & Tribune Co.* v.

of those cases in *Leathers* v. *Medlock*, 499 U.S. 439, 448 (1991), concluding that a tax affecting 100 cable television systems "hardly resembles a 'penalty for a few.'" Petitioners have not demonstrated that the producers of the lascivious magazines and other materials reached by the Act constitute the sort of small and discrete group of speakers involved in the Court's earlier cases. Cf. Pet. 4 (asserting that some "219 different 'adult' magazines" are sold annually at military exchanges). Moreover, while the statutes in those cases imposed what was clearly a "penalty" on a few publishers and not on other businesses, the Act, at most, denies petitioners a special benefit (*i.e.*, the government's selection of their products for sale at military exchanges) that is enjoyed by relatively few businesses, publishers and non-publishers alike.

Petitioners err in asserting (Pet. 26) that the court of appeals' conclusion that the Act is not viewpoint discriminatory "conflicts sharply with recent decisions of at least six other Circuits." The mere fact that the government action in those cases was held to be viewpoint discriminatory, whereas the Act in this case was not, does not create a direct "conflict * * * on the same important matter" within the meaning of this Court's Rule 10(a). None of those cases involved

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Minnesota Comm'r of Revenue, 460 U.S. 575, 591 n.15 (1983) (invalidating state tax that affected 11 publishers, only a few of which incurred any substantial tax liability); *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936) (invalidating state tax that affected only nine publishers); see also *Leathers* v. *Medlock*, 499 U.S. 439, 444-446 (1991) (discussing narrow impact of taxes at issue in all three cases).

a statute, or other government action, that drew distinctions based on "lasciviousness."[12]

4. Petitioners argue (Pet. 28-30) that, even if the court of appeals correctly held that the Act is not a viewpoint-based regulation in a public forum, the court nonetheless erred in holding that the Act was

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[12] See *Summum* v. *Callaghan*, 130 F.3d 906, 919-920 (10th Cir. 1997) (church that was prevented from erecting religious monument in county park, while fraternal organization was allowed to erect monument espousing its views, stated claim for viewpoint discrimination); *Burnham* v. *Ianni*, 119 F.3d 668, 676 (8th Cir. 1997) (university chancellor's removal from display of photographs depicting professors with firearms constituted viewpoint discrimination against the professors' position "that the study of history necessarily involves a study of military history, including the use of military weapons"); *Gay Lesbian Bisexual Alliance* v. *Pryor*, 110 F.3d 1543, 1545 (11th Cir. 1997) (statute that prohibited universities from using public funds to "sanction, recognize, or support" any organization that "fosters or promotes a lifestyle or actions prohibited by the sodomy and sexual misconduct laws" was viewpoint discriminatory); *Grossbaum* v. *Indianapolis-Marion Cnty. Bldg. Auth.*, 63 F.3d 581, 588-589 (7th Cir. 1995) (policy that permitted most seasonal displays at government building, but prohibited seasonal displays with a religious perspective, constituted viewpoint discrimination); *AIDS Action Comm.* v. *Massachusetts Bay Transp. Auth.*, 42 F.3d 1, 10-11 (1st Cir. 1994) (transit authority's excluding "sexually explicit and/or patently offensive" condom advertisements, while permitting film advertisements that were "at least as sexually explicit and/or patently offensive," could "give[] rise to an appearance of viewpoint discrimination").

As petitioners note (Pet. 26), the Court granted certiorari to consider one of the decisions relied on by petitioners, *Finley* v. *NEA*, 100 F.3d 671 (9th Cir. 1996), cert. granted, 118 S. Ct. 554 (1997). We believe that the two cases are sufficiently different that no need exists to hold this case for disposition in light of *Finley*.

sufficiently "reasonable" to satisfy the First Amendment. Petitioners do not dispute that the court of appeals articulated, and purported to apply, the proper standard for determining the constitutionality of viewpoint-neutral regulations in a nonpublic forum: whether the regulation is "'reasonable' in light of the purpose of the forum." Pet. App. 21a (quoting *Perry Educ. Ass'n*, 460 U.S. at 49); see Pet. 28 (agreeing that this is the proper standard). They merely contend that the court of appeals did not apply that standard rigorously enough. But asserted errors involving "the misapplication of a properly stated rule of law" do not generally merit the Court's review. Sup. Ct. R. 10.

Petitioners suggest (Pet. 28-29) that the government was required to produce "evidentiary support" that the Act is reasonable. But this Court has not demanded such support for Acts of Congress reviewed for reasonableness. See, *e.g.*, *United States* v. *Edge Broadcasting Co.*, 509 U.S. 418, 427-435 (1993) (upholding constitutionality of federal statute regulating commercial speech without requiring evidence that statute directly advanced government's interest by reasonable means).[13]

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[13] The cases that petitioners claim (Pet. 28-29) to have taken a "[c]ontrary" approach are not on point. The courts in those cases were concerned only with the reasonableness of particular administrative regulations, not Acts of Congress, and sought evidence to justify regulations that appeared on their face to be viewpoint discriminatory, *Tucker* v. *California*, 97 F.3d 1204, 1215 (9th Cir. 1996), or counterintuitive, *Searcey* v. *Harris*, 888 F.2d 1314, 1321-1322 (11th Cir. 1989). The courts did not indicate that evidentiary support was always necessary in order to establish the reasonableness of a government action challenged on First Amendment grounds.

Petitioners next contend (Pet. 29-30) that the Act is unreasonable because it is underinclusive—that is, because it does not restrict the government's sale of *enough* expressive materials. But underinclusiveness is not a concept to which this Court has accorded any significant force in cases involving nonpublic fora. See *Perry Educ. Ass'n*, 460 U.S. at 37 n.13 (citing *Greer*, 424 U.S. at 838 n.10). Here, as in *Kokinda*, it would be "anomalous" if the Act's allowance of some speech could constitute "evidence that it is impermissibly suppressing other speech." 497 U.S. at 733. Rather, the Act's "generous accommdation of some types of speech testifies to [Congress's] willingness to provide as broad a forum as possible, consistent with [the military] mission," *ibid.*, and thus to the reasonableness of the Act.[14]

Petitioners suggest (Pet. 30) that Congress could have employed a "non-endorsement" sign at military exchanges as a less restrictive alternative. But arguments about less restrictive alternatives are out of place in cases involving nonpublic fora. See *Cornelius*, 473 U.S. at 808 ("The Government's decision to restrict access to a nonpublic forum need only be reasonable; it need not be the most reasonable or the only reasonable limitation."); accord *Kokinda*, 497 U.S. at 735-736.

Finally, the reasonableness of the Act is underscored by the fact that the choice made by Congress,

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[14] Petitioners also assert (Pet. 30) that the government's purpose of avoiding the appearance of official endorsement of lascivious publications is unreasonable, because military exchanges also sell other products, such as cigarettes and alcohol, that the military is not perceived to endorse. This, again, is an argument regarding underinclusiveness, which has little force in a case involving a nonpublic forum.

i.e., to prohibit the sale of "lascivious" material at military exchanges, is the same choice that the military itself could make if the Act did not exist or were invalidated. Petitioners did not seek, and the district court did not grant, an injunction against the government's ceasing to sell such material for *any* reason; the injunction restrained the government only from doing so "as a result of the Act." Pet. App. 67a. Accordingly, even if the Act itself were unenforceable, the Department of Defense, military commanders, or individual purchasing officials could still decline to sell "lascivious" material at military exchanges based on an independent determination that, for example, the government might otherwise be perceived as endorsing such materials.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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